

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's response to the Home Office
Consultation Modernising Police
Powers: Review of the Police and
Criminal Evidence Act (PACE) 1984**

June 2007

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

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Introduction

1. Liberty welcomes the opportunity to respond to the Home Office review of the Police and Criminal Evidence Act 1984 (PACE). We are also pleased to see that the consultation proposes the setting up of a PACE review board with membership drawn from a range of representative interests. The operation of PACE is rightly subject to ongoing review. This has previously been through periodic consultation. A review body should be able to provide more effective consideration of PACE. The consultation asks for opinions and suggestions on a range of subjects. Some of these are operational matters aimed at those who use PACE which we will not be commenting on.

Commentary

2. The first part of the consultation looks at the use of PACE on the street, for entry search and seizure and at the police station. There is little in the way of specific recommendations so we are only able to make a few general comments. In relation to street disposals, the consultation asks for ‘proposals about if, and how these (police powers) should be rationalised or whether there is a gap...this includes any need to strengthen enforcement powers in the event of breaches’¹. These comments are made in the context of looking at ways in which it might be possible to ‘reduce the need to take a person into custody’². Of course this could be a desirable outcome both for the person involved and in terms of effective use of policing resources. However, whatever the benefit and justification, strengthened enforcement powers for breach of street imposed directions is a move towards summary policing powers. In recent years there has been a large increase in the powers of police officers to impose directions with breach being a criminal offence³. Without further detail it is difficult to make more specific comment other than to say that a desire for expediency should not be at the expense of increasing reliance on summary powers.

¹ Paragraph 3.6

² Paragraph 3.3

³ Examples being the creation of dispersal powers under s.30 of the Anti Social Behaviour Act 2003 and s.27 of the Violent Crime Reduction Act 2006.

3. The consultation also asks for suggestions as to ways in which entry under Part II and Code B of PACE might be improved. It seeks to ‘explore ways in which we can rationalise the process of warrant application and execution from both a police and court perspective’⁴. This suggests that greater police self-authorisation of warrants is being considered. Again this would reflect legislative trends. The Serious Organised Crime and Police Act 2005 (SOCPA) allowed scope for a single court issued warrant to justify multiple usages. The UK Borders Bill currently before parliament allows the police to self authorise entry onto premises in order to locate passports. Self authorisation by the police does in theory allow a certain level of accountability in that, if a warrant is obtained without justification, then a person can make a complaint to the Independent Police Complaints Commission. However this can be a lengthy process and can only occur after the event. Independent authorisation and oversight of the warrant application process should remain at the heart of entry powers under PACE.

4. There is also reference to whether there is a need to review provisions allowing access to legally privileged, journalistic and other materials requiring special application procedures under Schedule 1 of PACE. Schedule 1 requires more stringent processes including the order to be made by a circuit judge rather than justice of the peace and includes, for example, a need to be satisfied of the value of the material to an investigation. It is suggested that the need to review the current process is necessary ‘to meet 21st (century) challenges in tackling crime’⁵. There is no detail given as to what these challenges are or why the current system fails to meet them although we presume they relate to concerns over terrorism and organised crime. To justify any weakening of the current requirements there should be clear explanation as to what the problems are and what alternative is being proposed. It is not obvious why the need for a judge and more stringent requirements would inevitably and by itself cause delay. Without a pressing and identifiable need for change we cannot see the need for relaxation of the current regime.

5. The use of street bail is identified as a further area of potential change. When street bail was introduced in the Criminal Justice Act 2003 Liberty agreed that it could

⁴ Paragraph 3.8

⁵ Paragraph 3.10

serve a useful purpose. Street bail can be beneficial for both the police and suspect.⁶ We do not wish to see people being taken to a police station at times which are inconvenient for them or the police. Conditions can now be added to street bail as a consequence of the Police and Justice Act 2006. When this Act was passing through parliament Liberty expressed concerns that the potential scope of restrictions and length of time that conditions might be imposed could make conditional street bail punitive, set people up for breach and leave the powers open to abuse.

6. The consultation says that take up of street bail has been low and looks for ways to encourage greater take up. Encouraging greater use of street bail was the reason for giving police the power to impose conditions on that bail under the Police and Justice. It is surely premature to start thinking of more, new ways of encouraging greater use of these powers when the relevant provisions of the 2006 Act came into force less than two months ago. We agree that greater use could be of benefit to both police and public but are would be cautious of at any proposed increase in the use of conditional bail. People granted conditional street bail would not have had a chance to consult a lawyer about the legality and implications of the conditions. These important safeguards are not normally triggered until a person attends at a police station. In the case of police station bail the custody sergeant, who is independent from the investigation, performs a semi judicial role in deciding if bail and conditions are justified. By definition, the custody sergeant would not be present where bail is granted on the street and the Bill would therefore require an investigating officer (who may be inexperienced) to be arbiter of bail conditions. Any move towards increased summary power exercised by police officers increases the scope for arbitrary, unjustified and inconsistent use.

7. As a more general observation the last few years have seen a dramatic increase in the exercise of summary policing powers and an increase in police use of discretion. As well as the examples mentioned above there has been widespread use of stop and search powers without the need for suspicion under s.44 Terrorism Act 2000, the making of all offences arrestable under SOCPA, and increased powers for

⁶ An example of effective use of street bail involved the case of a mother who, while out with her three young children was arrested for shop-lifting. She was given street bail to attend the police station at a later date so that she could arrange care for her children.

use against protestors. We believe this tendency to be neither in the interests of the public nor the police. Clearly, the use of discretion has always been an obvious and necessary part of day to day police work. However, continued moves towards greater police discretion sees the Government absolving itself of responsibility to lay down clear indicators of what powers the police can legitimately use. We do not believe it serves the police to be placed in this position. On the one hand they are given broad powers and are under pressure to use these in order to meet targets and reduce crime. On the other hand they must act appropriately, proportionately and in a manner compliant with individual rights. Moves towards discretion based policing makes the balance more difficult to achieve and places the responsibility for striking this balance squarely on the shoulders of, sometimes young and inexperienced, police officers.

8. When the consultation was published, a great deal of attention was given to plans to introduce short term holding facilities likely to be located in shopping centres. These are intended to be used in situations where a person was likely to be held for a short period following arrest for a minor offence. Detention would be for a maximum of 4 hours allowing identity to be confirmed, photographing/ fingerprints/ DNA sampling and then processing for summons/ charging by post or penalty notice etc. Liberty does not take issue with the principle of short term holding facilities. Transportation of persons to and from a police station can be time and resource consuming for the police and extremely inconvenient for the person arrested. If there is to be no formal interview we do not see a problem with processing in a more convenient and efficient manner. What matters is not the location but the process safeguards. If compliance with PACE and its codes of practice is of the same standard as applied at a police station then we do not see a problem.

9. Having said that, we would caution against some of the practical problems that might arise from the use of short term holding facilities. By their nature the custody officer is likely to be a civilian as permitted by SOCPA. Liberty has expressed reservations about the use of civilian custody staff. Custody officers are the custodians of PACE and we believe that an experienced police sergeant will feel more able to ensure PACE compliance from fellow officers than a civilian. We appreciate the Home Office has emphasised that all civilian staff will be properly trained and able to carry out custody roles as effectively as police sergeants. We hope this will be

the case. It is easy to see how the convenience of short term holding facilities might allow them to be effectively used as holding cells without proper process being applied. It is vital that custody officers ensure that PACE enforcement is as strict as any police station.

10. Liberty's principal concerns arise from the section on 'Biometric information and identification procedures'. The consultation notes the restriction on the ability to take 'fingerprints etc in relation to all offences' and asks whether there 'is scope to populate identification databases and remove unnecessary operational constraints on the extent to which police are able to use fingerprints etc. to prevent, detect and investigate crime'. Making the fairly safe assumption that 'fingerprints etc' relates to taking DNA, the consultation is clearly considering the expansion of grounds for permanent DNA retention to arrest for non-recordable offences as this is the only possible extension left.

11. When the National DNA Database (NDNAD) was set up in 1995 it contained samples of those who had been convicted of certain offences (mainly involving violence or sexual assault). Since then the grounds for permanent retention have been expanded on several occasions to the current position where DNA can be retained following arrest for a recordable offence. As a consequence of roll out the UK has by far the greatest percentage of its population on the NDNAD. 5 per cent of the UK population is on the NDNAD as opposed to 1 per cent in the United States and an average 0.3 per cent in other EU nations. The nature of roll out has resulted in a vastly disproportionate number of Afro Caribbean males being on the NDNAD. There are also an estimated 50,000 children on the register who have no convictions or cautions.

12. If further extension takes place so that arrest for non recordable offences results in retention then there will be massive further expansion to the register. Non-recordable offences are those which do not carry a custodial sentence and cover the most minor offences such as minor traffic violations and dropping litter⁷. We are not aware of statistics showing the percentage of population who will be arrested during their lifetime but imagine it will be high. If sufficient numbers have their DNA taken

⁷ Dropping litter is an offence under s.87 of the Environmental Protection Act 1990

a tipping point might eventually be reached when compulsory retention for all becomes a possibility.

13. It is vital that proper debate about the use of the NDNAD takes place now. This should consider not just whether any extension is justified but whether the current position has improved crime detection. Liberty would for example challenge an assertion in the consultation that ‘there are benefits in simplifying the powers in terms of the potential for increased detections’⁸ without analysis of the existing regime. We agree that there is no need to debate the desirability of some form of NDNAD. In specific cases it has proved a valuable crime detection tool. Arguments in favour of extension follow a simple logic that if the DNA database can help solve crime then the further it is extended, the more crime will be solved. These arguments are strengthened by periodic high profile and often emotive cases of serious crimes being solved through addition to, or improvement of, the NDNAD. However, statistically the NDNAD does not seem to have a significant impact upon crime detection.

14. A rationale should justify the current position allowing retention for those arrested but not charged or cautioned of an offence as opposed to retention from a random sample of the population. This rationale must logically be that retention from these people will result in an overall improvement in DNA for detecting crime as opposed to random sampling. However, there does not seem to be any evidence to support this presumption. This was accepted by the Government on 9th October 2006, when Joan Ryan MP stated “As far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large.”⁹ As a consequence there does not seem to be any basis for distinguishing these people from the population as a whole. The current approach therefore seems to discriminate against those sampled on the basis of arrest. Without evidential backing it appears that the policy basis for permanent retention of those arrested can be little more than ‘people who are arrested are probably criminal even if nothing can be proven in this case’. Given the disproportionately high number of Afro Caribbean males on the NDNAD this is a worrying conclusion.

⁸ Paragraph 3.35

⁹ 8th October 2006, HC Deb, Col 491W

15. The assertions frequently put forward by police and Government as to the number of ‘matches’ made to the DNA profiles of unconvicted persons are misleading since (a) ‘matches’ only result in convictions in a small proportion of cases and no conviction information is given; (b) no information is given as to whether those persons were already suspects or would have been otherwise identified through traditional policing methods; and (c) the figures are probably inflated by the inclusion of a high (but necessarily diminishing) proportion of ‘cold cases’ relating to crimes committed before the police had today’s capacity to use DNA in crime detection.

16. In addition there is no evidence that the detection of crime is improved by increasing the size of the Database. This is illustrated by the fact that, although there has been a massive extension of the NDNAD over the last 3 to 4 years, the rate of crime detection using the Database has stayed at about 0.35% of all recorded crime. If extending the size of the NDNAD had been successful one would expect this proportion to have increased. One limiting factor is that the usefulness of the Database is driven by the ability to obtain DNA from the crime scene. In many cases DNA is not available. Regardless of advances in DNA technology it remains the case that DNA is relevant only in a limited number of cases. Primarily these will be investigations involving sexual assault or violence. These represent a small proportion of overall crime.¹⁰ In many of the cases involving sexual assault or violence the identity of the alleged offender is not in issue. In many allegations involving sexual assault consent rather than identity will be the defining issue. Similarly, evidential issues around violent crime will often be based on self defence or degree of involvement rather than establishing actual presence. Overall the importance of DNA attaches to a very small number of cases. However, its importance as an evidential tool is dramatically enhanced in the public consciousness when DNA provides the ‘magic bullet’ allowing an historic crime to be solved. The fact that these crimes tend to be of an extremely serious and dramatic nature tends to mask the relatively small impact DNA has on the criminal justice system as a whole.

¹⁰ According to the British Crime Survey Statistics for 2005-2006 there were 40,300 Serious Violent Crimes Against the person (including sexual assault and firearms offences) out of a total of 5,556,500 total recorded crimes. This is about 0.7% of the total.

17. The retention of DNA would be less of an issue if there were a process allowing deletion of samples when appropriate. However, while there is a general discretion for the police to retain samples under s.64 PACE, there is no statutory basis for determining the circumstances when either continued retention or destruction would be appropriate. As a consequence this has become an operational matter determined by individual police authorities. As a general rule destruction seems to take place very rarely. One consequence of this is that DNA retention is becoming an issue across a wide demographic. Many who assumed that retention was reserved for those who commit offences of a violent or sexual nature are shocked to find that family members are having DNA permanently retained following relatively innocuous contact with the police. We would urge that consideration of permanent retention on the NDNAD focuses more on reviewing the process for sample destruction than on seeking yet further grounds for expansion.

18. The consultation seeks views on expanding the scope to question a person after a decision to refer to a prosecutor for a charging decision. Liberty first suggested that the grounds for re-question currently permitted under PACE might be reconsidered following publication of the Terrorism Bill in 2005. We proposed it as an alternative way to deal with problems faced by the police in terrorism investigations without resorting to 90 day pre charge detention. The current position under Paragraph 16.5 of Code C of the Police and Criminal Evidence Act 1984 allows for re interview i) to prevent or minimise harm or loss to some other person, or the public ii) to clear up an ambiguity in a previous answer or statement or iii) in the interests of justice for the detainee to have put to them, and have an opportunity to comment on, information concerning the offence which has come to light since they were charged or informed they might be prosecuted. We suggested that this might be extended to situations where the Secretary of State considers it to be in the interests of national security or if the person is arrested in connection with terrorism.

19. The proposal now seems to be that there might be a general extension of the grounds for further questioning.¹¹ As Liberty has suggested further questioning in

¹¹ Our proposal to allow conditions to be placed on pre-charge bail to remove the need for a person to be detained for up to 90 days was also adopted as a non-terrorism-specific power in the Police and Justice Act 2006.

relation to terrorism we need to justify any concern over a general extension beyond the terrorism context. When we first made the suggestion the Government responded by expressing concern at the potential for abuse pointing out that people could be charged and possibly remanded on relatively minor charges as a holding strategy while further investigations were carried out. We acknowledged that there was the potential for abuse but argued that this was a reason to ensure that the scope was limited so that re-questioning took place infrequently and use was carefully monitored. This argument is a reason to be concerned about a general extension of powers to re-question. The more frequently it occurs the more difficult it would be to monitor and the greater the scope for abuse.

20. Our suggestion also arose as a response to an exceptional circumstance. Terrorism cases have been treated differently from other criminal cases for many years by allowing greatly extended periods of pre charge detention. The current 28 days limit is seven times that permitted for the most heinous murder or the most complex fraud. Our suggestion to allow further questioning was made both in recognition that terrorism is treated differently from other crimes and in response to a suggestion that up to 90 days pre charge detention be permitted. We argued that re-question was a more proportionate response than extension of pre charge detention and would cause less damage to community relations.

21. As a consequence we think that the justification for allowing re-question for terrorism investigations would not extend to a general extension. The current scope within PACE allowing for further questioning in the interests of justice if further information comes to light should already allow appropriate scope to further questioning. If evidence came to light that a person charged with fraud was using the proceeds to fund drug trafficking it would surely be in the interests of justice to question further. The ability to ask further questions should remain the exception rather than the rule.

22. Any move towards post charge questioning, whether limited to terrorism cases or used more broadly, should be dependant on independent judicial authorisation. The existing framework in PACE would allow for judicial determination of what 'the interests of justice' might be, whether there is 'an ambiguity in an previous answer or

statement' that needs resolving and so on. If there were an extension to cover specific terrorism related circumstances these could also be determined by a judge deciding, for example, if there were legitimate national security considerations. Judicial authorisation would minimise the legitimate concern expressed by the government, that there would be scope for abuse by through the use of trumped up holding charges. It would however, necessitate limiting the circumstances when further questioning could take place. If questioning were allowed in a range of cases it would prove logistically problematic by draining judicial resources

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